No. 4080

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA, Plaintiff in Error, *vs.* NORTHERN PACIFIC RAILWAY COMPANY, Defendant in Error.	No. 4080

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

Brief and Argument for Defendant in Error

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The statements at the opening and as found running through the brief as prepared by the Assistant Attorney General, who came to Seattle and took the responsibility of the trial of this case in the District Court, evidence a keen feeling of partisan grief that the jury was so bold as to find, on conflicting evidence, as against the contentions and evidence offered by the government.

The references to the evidence as received and excluded will be noticed in due course. It is sufficient here to say that many of the excerpts therefrom and the adverse references thereto are based upon disconnected and incomplete and, we believe in some cases, misleading references to the testimony both given and offered.

There is much criticism of the trial court and many references to the alleged attempts of the defendant in error to camouflage the real issues run-

ning through the opening statement. However, counsel, on pages 47 and 48 of his brief makes a segregation of eight questions, in the discussion of which he goes over the same matters. We will endeavor to limit our discussion, so as not to cover these matters more than once.

Generally speaking, these questions cover: first, a question of pleading; second, the admission and rejection of evidence; third, the evidence admitted and instructions given with reference to the shopmen's strike; fourth, the action of the court in failing to instruct for the government as to the eighth count; fifth, the action of the court in directing a verdict on the eighteenth count; sixth, the question of moving penalty defect cars, not coupled with chains, in revenue trains; and, seventh, a general complaint as to the modification and giving of certain instructions.

THE AFFIRMATIVE DEFENSE AND EVIDENCE IN ITS SUPPORT.

I.

In considering the assignments as against the affirmative defense, we believe that it is proper to include, in connection with a discussion thereof, practically all of the objections raised as to the evidence admitted in this case, all of which went to the competency of evidence showing the strike situa-

tion that confronted the defendant in error at the time of the various alleged violations, the basis of this litigation.

This affirmative defense alleges in substance that on the 1st day of July, 1922, what are known as the Joint Shop Craft Employees of the defendant, including those engaged in the work of repairing and inspecting cars and the doing of the general mechanical work in connection with their upkeep, in protest of an award by the United States Labor Board, ceased their employment and withdrew from the service of the defendant, and that their withdrawal was without fault on the part of the defendant and that it, pursuant to the directions of the labor board, proceeded to and used its best efforts toward obtaining other employees to perform this work, and was using practically its entire official staff for such purpose, at the time referred to in the several counts, in an endeavor to perform its duty to the shipping public; that in view of the situation it was physically impossible for the defendant to keep accurate, or any, records of the condition of the various cars, alleging, however, that all cars transported were properly inspected and no equipment was used which would endanger the safety of its employees in operation or those having business with it. The affirmative defense then alleges:

> "That if any of the cars referred to in the plaintiff's complaint were in the condition as referred to therein *the same arose as the result of an emergency* and beyond the control of this defendant and without any default upon its part, *and the defects,* if any, *were remedied as soon as consistent in view of such emergency and after movements made necessary thereby, at the then nearest most available point therefor.*"

This, in effect, was a denial that any cars that could be repaired were transported in any road movement and an allegation that defective cars moved, if any, beyond the point alleged in the complaint, which but for the emergency were repair points, were moved to the then nearest, most available repair point, although they were not in all cases moved for repairs, as soon as they would have been, except for the emergency.

Taking all of the facts pleaded, if it is at all material, the necessary inferences can be drawn from this pleading to bring this answer within the provisions of the amendment to Section 4 of the act as construed by this court in *U. S. vs. Northern Pacific,* 287 Fed., 780, *cited and referred to several times by the plaintiff in error,* and in any event, the jury were properly instructed in accordance with the request as made by the government and in line with such opinion, the court instructing the jury as follows:

> "As to each of the cars hauled from Auburn or Centralia, if found to be defective as alleged, *the jury must return a verdict for the Government unless the defendant has shown: That such car had been properly equipped* with the appliances described by the Act of Congress and the orders of the Interstate Commerce Commission; *that the defective equipment became defective while being used by the defendant on its line of railroad; that the defendant,* through its officers or agents, *had discovered the defects;* that (298-263) the defendant was hauling the car to the nearest available point from Auburn or Centralia where the car could be repaired for the purpose of putting it in repair, and that such repairs could not be made at Auburn or Centralia." (R. p. 302.)

A reading of the other instructions theretofore given by the court shows that the court was particular to an extreme degree in putting before the jury every provision, not only of the act itself, but of the regulations issued pursuant thereto and which were alleged to have been violated by the defendant in this case and many of which counsel has printed in his brief, the court instructing the jury that if they found that such provisions or such regulations had been violated, their verdict should be for the government. *So far as the technical sufficiencies of the matters pleaded or the words used in this affirmative answer are concerned, in view of the instructions given, this question of pleading becomes wholly immaterial.*

II.

Counsel for the government, on the first page of his brief, makes this statement:

> "It might be well to state at the outset that in this case the carrier challenges the right and duty of the government to attempt 'to promote the safety of employees and travelers' during the period when certain of its employees were on a strike, and that the record clearly discloses that, during such period, the *defendant failed to do all that it could reasonably do in the interest of safety.*"

Counsel has italicized in his brief what we have italicized—this in the face of a record showing that every ounce of energy of the entire official staff of this defendant in error, pursuant to what we may safely say was the mandate of the government itself, was expended, many working as much as twenty-four hours without rest, to keep the railway company's equipment safe (R. pp. 197, 216, 246, 267). *It is not a kind statement* in view of a record in which there is not a single inference that can be found that supports it, and it has *no* more *foundation under the record, or in fact,* than the other of the statements just quoted.

It was stated to counsel for the government and to the court at the opening of the trial and was repeatedly stated throughout the entire trial that it was not contended under this affirmative defense,

nor was it contended in connection with the evidence offered, that the shopmen's strike would in any way relieve the defendant from its obligations in connection with the movement of defective equipment under the Safety Appliance Act, excepting only in connection with the question of the "nearest available repair point."

The purpose of this affirmative matter, some of which the court might have stricken if moved against, as the same matters could have been proven under the defendant's denials, was to show, among other things:

A. That after full inspection and complete compliance with the Act, by the malicious acts of third parties equipment was deliberately broken and damaged, this was perfectly competent in view of the evidence of the two government inspectors as to time and place of inspection, and also observation of departing trains.

B. That the striking shopmen and their sympathizers so interfered as to prevent the use of certain of defendant's repair facilities.

C. That by reason of such emergency, the company could not, as it did in normal times, keep an accurate record, or any record as a matter of fact, of its car repair work or of its inspections, all of which was known to the two government inspectors.

D. As the evidence of the two government inspectors went to the point that their inspection as to the trivial defects covered by the several counts was made prior to the trains being made up, then if it was a fact, in view of the emergency, that such repairs were not and could not, by reason of the shortage of force, be made until the cars were in the train, evidence of such situation was competent.

E. That by reason of such emergency Auburn, South Tacoma and Centralia were not available repair points.

F. To establish that the company was not derelict as stated in the opening part of appellant's brief, and to put before the jury all the surrounding facts and the existing conditions in connection with the disputed questions of fact to be determined by it.

G. To explain to the jury, the reason the defendant's officials, who were witnesses, were doing car repair work at the time.

An examination of the evidence will show, both from the hour of the alleged inspections as made by the two government's witnesses and by the admissions made by them on cross examination, that practically all the cars at both Auburn and Centralia were inspected by them either prior to or at the time the cars were being switched into the train that is alleged to have hauled the cars therefrom (R. pp.

150, 158, 81), and it was certainly competent to show the surrounding conditions in connection with the evidence that, while in normal times ordinary repairs were made prior to the cars being switched into the outgoing trains, in view of the emergency, the official staff devoting its efforts to the work of moving the trains over the defendant's system, had neither the time nor the facilities to make these different repairs until the train was made up, and also to show that they had neither the time nor the facilities to make any records so as to have a memorandum of the actual cars moved after being inspected by them.

There is absolutely no excuse for any statement that the government is justifying itself for an appeal of this case for the purpose of determining whether or not a strike such as the shopmen's strike is an excuse for failure to live up to the Safety Appliance Act. Counsel for the government does need some excuse both for the necessity of a trial of this case and for an appeal when an adverse verdict was rendered. I do not mean that counsel is to blame either for the bringing of the action or for the appeal, but it is certainly small business on behalf of whoever is responsible, both for the institution of the suit and for the appeal, in view of the facts disclosed by this record and the existing situation and the attitude of the government at this time,

of which the court will take notice, for we repeat that from the opening of the case, and from prior to the receipt of any evidence it was expressly stated and continuously reiterated that no one would contend that the strike, in and of itself, would afford an excuse for failure to live up to the Safety Appliance Act. So that any argument that attempts to justify this appeal on the ground as stated is wholly without foundation, both as a matter of fact and under the issues and the law as the case went to the jury.

III.

We quote in full Amended Section 4; this for the convenience of the court:

> "Sec. 4. That any common carrier subject to this Act using, hauling, or permitting to be used or hauled on its line any car subject to the requirements of this Act not equipped as provided in this Act shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered as provided in Section six of the Act of March second, eighteen hundred and ninety-three, as amended April first, eighteen hundred and ninety-six: PROVIDED, That where any car shall have been properly equipped, as provided in this Act and the other Acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, *such car may be hauled* from the place where such equipment was first discovered to be defective or insecure *to the*

nearest available point where such car can be repaired, without liability for the penalties imposed by section four of this Act or Section six of the Act of March second, eighteen hundred and ninety-three, as amended by the Act of April first eighteen hundred and ninety-six, *if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point;* and such movement or hauling of such car shall be at the sole risk of the carrier, and nothing in this section shall be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee caused to such employee by reason of or in connection with the movement or hauling of such car with equipment which is defective or insecure or which is not maintained in accordance with the requirements of this act and the other Acts herein referred to; and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

We have italicized certain of the language used which language is pertinent to this discussion, and it will be noted that the act provides for the movement of defective equipment not to the nearest but to the "nearest available point" where such car can be repaired, and that it further provides that such movement shall be authorized if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point.

We ask the government in all sincerity to show

to this court, if it can, upon what ground it can be successfully contended that the situation with this shopmen's strike as it affected this defendant at both Centralia, South Tacoma and Seattle, was not material in the determination of the question as to whether or not Auburn, Centralia or South Tacoma were available repair points, and to point out to this court, if they can, why this evidence was not material in connection with the contention of defendant that Renton was the nearest available repair point.

Outside of the emergency incident to this strike, this court would almost take judicial notice of the fact that at both Auburn and South Tacoma this company maintains some of the largest railroad repair shops on the Pacific Coast. Both of these points are terminals, and excepting for an emergency such as pleaded and such as proven there would have been no escape from the penalties imposed by the Act if a defective car had been moved beyond such terminals.

We also suggest that the government advise this court why, with Auburn being admittedly a terminal with large shops, the inspectors themselves pass 23 cars admittedly defective moving with the one defective car covered by count eight to the Renton shops for repairs. (See Rec. p. 240.) Is it reasonable, in view of the fact that each count

covers strictly technical defects, on log flats moving on level track but a few miles, that these inspectors would overlook these 23 other cars if they themselves did not know that by reason of this emergency Auburn was not, in the language of the statute, an available repair point at the time.

In the case of *U. S. vs. Boston & M. R. R. Co.,* 243 Fed. 795, in the District Court of Massachusetts, District Judge Morton, referring to the terms of this amendment and the use of the word "available," uses this language:

> "The statute permits a defective car to be hauled, not simply to the nearest point where it can be repaired, but 'to the nearest available point.' The word 'available' cannot be ignored. It has been judicially defined (in connection with the word 'assets') as follows:
>
> "The word 'available' must have been inserted for some limiting or qualifying purpose. It must have been intended as including certain assets and excluding others, else there was no reason for its use. The ordinary meaning of 'available' is 'usable, capable of being used to advantage.' *Hamilton vs. Menominee Falls Quarry Co.,* 106 Wis. 352, 359; 81 N. W., 876, 878.
>
> "Availability obviously depends, under the statute, on other considerations beside that of mere distance. Whether Fitchburg was, under all the circumstances, the 'nearest available' point for the repair of this car, was a matter of business judgment. Upon such a question, involving as it does many elements, the decision of those in charge of the business, if made in

> good faith, is entitled to serious consideration. It is not shown to have been wrong in this instance."

In *Denver & Rio Grande Ry. Co. vs. U. S.,* 249 Fed. 822, Judge Amidon in speaking for the Circuit Court of Appeals for the Eighth Circuit, uses this language:

> "We do not lay down any absolute rule which would forbid hauling a defective car past an intermediate repair point. It might be that *the congestion of defective cars at that point,* or the seriousness of the defect in the car hauled, *would be such as to justify the movement.* All we say is that, when a car is hauled past the nearest repair point at which a supply of men and materials is kept, adequate for making the repair required, this justifies the holding that the law is violated, *unless there is a showing of special reasons for the movement."*

As suggested by Judge Amidon and as Judge Cushman told the jury in this case (Rec. p. 297) the defendant had the burden of showing as to the one or possibly two counts, that Auburn and Centralia were not available repair points, and such was the purpose of the evidence.

However, it would be difficult to frame any better language than that used by Judge Cushman in instructing the jury in this case:

> "So far as the question concerning all those counts of the complaint where the defendant contends that the car was moved for the purpose of repairing the defects at the nearest

available repair point, if you find the defect to have existed and that the car was moved out of the yard on to the main line, *the burden of showing by a fair preponderance of the evidence that the removal was necessary* in order to have the car repaired, that it could not be repaired in the yard and it was being removed to the nearest available repair point,—the burden of establishing those matters by a fair preponderance of the evidence *rests upon the defendant.*

"There has been considerable said in the evidence and in the argument regarding the effect of the strike. *You are authorized to take what the evidence has shown regarding this strike into account in determining* (294-259) *whether the movement was necessary for the repair of the cars and whether Auburn and Centralia were available repair points for the purpose of making the repairs in the matters that are claimed to have been defective.* You can readily comprehend that in establishing a railroad every station does not have to be a repair point for all purposes or for the purpose of repairing all kinds of defects. If the railroad had established at division stations and other points facilities for making repairs, and the strike came along and rendered some of them unavailable, they would cease to be available repair points by reason of the strike; that is, it would not only be necessary to have tracks and shops and machinery and tools to effect repairs, but it would be necessary to have men to operate those shops, tools, equipment and machinery; and if the strike assumed such proportions that they could not get men at those particular points to work because of the friction growing out of the strike, *it might be concluded, if the evidence was sufficient, that they had ceased to be available repair points,* and it would not be a violation of this law to move a car to a repair point and remedy the defects

where that condition did not exist, or was not so acute, or where the friction was not so great. There may be other things that you might consider the strike as bearing upon. A strike, as you all know, and all of us know, as a matter of common knowledge, tends to array men on the two sides of the question. They have their sympathizers, and when their sympathy is aroused (2950260) it can affect their judgment and can effect their powers of observation. A bent brake staff that would not be a serious matter sometimes, if men get excited and are sympathizing with one side or the other, it might be magnified and might be minimized. *It works both ways.* That fact may enable you to harmonize to some extent the dispute in the evidence without finding it necessary to determine that one side or the other tried to deceive you." (Rec. p. 297, 298 and 299.)

"It is for you to determine under the evidence whether, under the existing conditions and circumstances surrounding the defendant's work at Auburn yards, it was necessary to haul this car beyond Auburn and to Renton, if it was so hauled, for the purpose of causing it to be repaired, and by 'necessary' I do not mean that you must find that it was impossible to repair this car at Auburn, but if you believe that the only practicable method, under the circumstances and conditions that existed at the time, required that such car should be taken from Auburn to Renton for the purpose of being repaired and that Renton was, under such circumstances, the nearest available repair point for the purpose of making repairs such as were needed, then I instruct you that the movement thereof by defendant for such purpose was not a violation of the law, and if you so find, your verdict should be for the defendant on this cause of action." (Rec. p. 305 and 306.)

In connection with this argument, it is proper to quote other instructions given and at the same time dispose of some of the other assignments. Judge Cushman instructed the jury:

> "If the jury believes, upon a fair preponderance of the evidence, that any car was hauled by the defendant from Auburn, or Centralia, in the condition alleged in the Government's complaint, its verdict should be for the government on any such cause of action, unless moved for the purpose of being repaired, as I have explained to you." (Rec. p. 300.)

This instruction, excepting that which is underscored, was the government's request No. 5, and although given, the government assigns and argues as its error 36 the alleged refusal to give it.

The court also instructed the jury:

> "It is no defense for the defendant to say that because of a strike of some of its employees it was unable to secure competent men to inspect and repair the cars involved in this case. Yet you may consider what the evidence has shown in that respect in determining the nearest available repair point." (Rec. p. 300.)

This instruction was, excepting that underlined, the government's request No. 8, concerning which, by *Assignment 37,* they allege and argue error in refusing to give, although, as stated, it was given verbatim.

The court further instructed the jury:

> "The provisions of the Safety Appliance Act are of such nature that they cannot be ignored, or set aside, by a carrier on the grounds of inconvenience to the carrier of keeping its equipment in repair." (Rec. p. 301.)

This is a portion of the government's proposed Instruction No. 9, covered by one of its assignments of error, and contains the substance thereof, and in fact the rest is covered by preceding instructions quoted, so that there is absolutely no more reason or merit in making this assignment, than the assignments as to the government's instructions No. 5 and No. 8 which as stated were given.

The government, by its *Assignment 39* alleges error in refusing to give its proposed instruction No. 12. The court did give Instruction No. 12 verbatim, as he did the other instructions complained of, adding thereto the words underscored. The court's instruction reads:

> "In order to comply with the spirit of the law, the defendant cannot establish a division terminal and make up trains at such terminal, and haul in such trains, cars with defective safety appliance, such as those involved in this case. Therefore, it is no defense to say that the defendant, owing to a shortage of inspectors and repairmen at Auburn, or Centralia, hauled any of the cars from these points, in road service, in the condition complained of by the Government. Notice the words 'in road service.' <u>They would have a right, if they could not be repaired there and it was necessary to</u>

move them in order to secure the repairs, to haul them to the nearest available repair point, because that would not be in road service." (Rec. p. 301.)

What we have said as to the last error assigned, equally applies to the *error No. 40* which refers to Instruction No. 13. The court merely added to said instruction the language which we have heretofore quoted having to do with the movement of cars to the nearest, most available repair point, on many pages of the government's brief, will be found statements urging that error was committed either in not giving or in adding the language underlined, a sufficient answer is that the instructions were given and the added proviso is but a correct statement of the law.

We also in this connection call attention to the fact that the proposed instruction of the government covered by *assignment of error 42* was given by the court, the court adding thereto the words underlined, such instruction reading as follows:

> "The fact that a car had other than the defects complained of, and that such other defects could not be conveniently repaired at Auburn or Centralia, cannot be considered an excuse for not repairing the defective equipment in question; provided you find it could have been repaired at Auburn or Centralia." (Rec. p. 302.)

Further in connection with instructions which

were requested by the government and as showing what issue was actually submitted, the court further instructed the jury:

> "While the fact of such withdrawal of certain of its employees from its service would not authorize it to violate the act of Congress and the regulations issued pursuant thereto under which this action is brought, you would be authorized in considering the evidence to take into consideration such surrounding conditions for the purpose of determining the issues submitted to you, and the evidence in connection therewith." (Rec. p. 307-8.)

The fact is that the court went over these instructions proposed by both sides carefully and the exceptions that were taken and the errors that are assigned excepting only in connection with the movement of penalty defect cars in commercial trains and as to the direction of a verdict as to count 18 are highly technical and wholly without merit.

We have felt these instructions, while treated under various headings by the government, should properly be discussed in connection with the other instructions covering the law as the case was given to the jury, and to show the purpose of offering and the reason for the admission of the evidence showing the strike situation.

There was no shifting from this issue—there was no camouflage, and while we will refer more

specifically to some of the evidence objected to, we submit that it was all competent in connection with refuting the testimony of government witnesses by showing the surrounding conditions in connection with the defendant's alleged justification under the terms of the statute of the movement of one car from Auburn to Renton and if the jury should have found for the government on the question of defects as to the one car moved from Centralia upon which it is alleged the logs fouled the handhold.

ADMISSION AND REJECTION OF EVIDENCE.

The court instructed the jury that there was no duty on the part of the government inspectors to call attention of any representatives of the railway company to the alleged defects (Rec. p. 300) and no such contention was ever made. Counsel complains, however, because his Witness Winter was asked whether he had advised any of the employees of the defendant. This witness answered, without any objection being first made, that he had not. It is true after he had so answered the question was followed up by enumerating the inspectors who inspected the train upon which it is alleged certain of the defects were found, the witness answering

that he had not. (Rec. p. 79.) Upon re-direct examination, the following is found in the record:

Q. Mr. Winter, you were asked if you notified any of the officials around there,—some of them being named,—as to having found these cars defective, and your answer was that you did not.

A. I did not.

Q. Now, will you state to the court and jury why you did not do that?

MR. WINDERS.—I object to that on the ground that it is immaterial why he did not.

THE COURT.—Objection overruled.

A. Well, a good many times, as in this case, we find that it does not do any good. (115-80.)

MR. WINDERS.—I move to strike that answer and that the jury be instructed to disregard it.

THE COURT.—I will deny the motion.

Q. (Mr. LIST, continuing.) State whether or not you actually made any inspection of any other cars on this particular occasion and notified any officials there of the defective equipment?

MR. WINDERS.—I don't think that is material. I object to it on the ground that it is not material.

MR. LIST.—We are trying to show that we have been more than fair to you.

THE COURT.—Objection sustained.

MR. LIST.—I offer to prove by this witness that on August 31 he reported to one of the officials of the Northern Pacific of having in-

spected about two hundred cars and having found approximately fifty of them in a defective condition; that he gave to the Northern Pacific official the record showing the individual numbers of these cars found defective.

MR. WINDERS.—Now, of course, counsel knows that is not competent. I object to it. We deny the allegation.

MR. LIST.—You opened the door.

MR. WINDERS.—I did not open the door.

THE COURT.—I permitted Mr. Winders' original question as to reporting to the officials of the railroad company, and Mr. Winders on cross-examination had a right to show, if he could, (116-81) any conduct on the part of the witness from which he might argue that it was inconsistent with his testimony. You would have a right on re-direct to explain why he did not make the report on those particular cars, in order to explain away the conduct that Mr. Winders was probably preparing himself to argue as inconsistent with his testimony; but you could not go into other cars.

MR. LIST.—He has answered that question, which your Honor permitted, that he found out that it did not do any good.

THE COURT.—I sustain the objection to your offer. The jury are instructed to disregard any statement or allusion to any other cars found defective and reported." (Rec. pp. 116-117.)

Counsel, although no exception was reserved, complains as to the action of the court in refusing the offer made as quoted above. Counsel devotes pages 56 to 59 of his brief arguing that the

court's action in this regard was error. We submit the foregoing quotation from the record is sufficient answer.

On the next page—at the top of page 60, counsel quotes from a part of a retort in a question, after an irresponsive answer given by the witness Winter, and then on page 61 and 62 attacks the cross-examination of Winter wherein he was asked if some of the strikers didn't complain about equipment and to the refusal of the court to permit him to show that these inspectors had been lenient and refers to page 145 of the record to support a statement which he repeats throughout his brief that the last defective equipment reported as against the Northern Pacific was on June 21st, while this is immaterial, it is significant that the record referred to don't show there was not other examinations and don't support a statement that other equipment was found defective.

We are not impressed with the pertinency of all of this argument having to do with the cross examination of these witnesses in view of the verdict returned by the jury. However, while it is not our intention to pay too much attention to the alleged references and to quotations of excerpts from the record, we will meet counsel as to Winter's testimony.

On direct examination the witness Winter tes-

tified that he tried the brakestaff on several of the cars of which complaint was made. (Rec. p. 49.)

On cross examination he further testified:

"Q. Now, you have testified that you got up on these five or six or seven log flats on which you say the brake staff was bent and you tried that brake staff?

A. Yes.

Q. Was anybody with you up on the car? Did Weeks go up there with you on the car?

A. It is not necessary to get up on the flat car sometimes to tell whether hand brakes will operate or not.

Q. *Did you get up on these flat cars* and try these hand brakes on which you claim the brake staff was bent?

A. *I think we did.*

Q. *Did you* or did you not? What is your testimony?

A. *I would say 'yes.'* " (Rec. pp. 74 and 75.)

Later on, still on cross examination, he testified:

"Q. Not on that individual car. Did you get on that car and try the brake?

A. I tried the brake. *I would not say whether I got on the car or not.*

Q. Did Mr. Weeks try it with you?

A. He did.

Q. You both tried it. Could you try that brake from the ground?

A. You could, yes. (75-40.)

Q. Was there a load of logs on it?

A. The car was loaded with logs; yes, sir.

Q. Did you try it more than once? Did you try that brake more than once?

A. *I would not say that we did.*

Q. *What is that?*

A. *I would not say that we did.*

Q. *Well, the jury would like to know whether you did or did not.* Did you try the brakes on that car, the fifth cause of action,—more than once?

A. We tried the brake when we inspected the car and noticed the condition of the car. And when it left in the train at 9:50 it was in the same condition.

Q. Of course you understand that in order to get a conviction you have to testify that. Now, you mean to tell this jury in answer to my question that you tried the brake on this car more than once?

A. I would not say that I did.

Q. Did you or did you not?

A. I would not say.

Q. Did you on that day try the brakes on any of these cars more than once?

A. I don't know. I would not say.

* * * * * * * * *

Q. *You won't say that you got up on the car, will you, Winter?* (76-41.)

A. *No, sir.*

Q. At that time there were some of these trainmen,—I don't say all or the majority of them, but a few of the trainmen working for the

Northern Pacific and the other railroad companies that were not out on strike that were quite active in trying to help the strikers out?

MR. LIST.—If the court pleases, that is objected to as incompetent, irrelevant and immaterial.

THE COURT.—Objection overruled.

MR. WINDERS.—It is a preliminary question.

MR. LIST.—Exception.

Q. (Mr. Winders, continuing.) There was a stray man or two that was not any too loyal to the railroad?

A. I would say generally—

Q. I didn't say generally. I have a great deal of pride in the employees of the Northern Pacific; but I say there were a few stray ones that were not very loyal,—that were trying to help make things as miserable as they could in the operation of these yards,—isn't that true?

MR. LIST.—If the court please, we object to that as incompetent, irrelevant and immaterial.

THE COURT.—I think I will sustain the objection to that.

Q. (Mr. Winders.) Is it not a fact, Mr. Winter, that there were continually tales being carried to you and to Mr. Weeks from men who were drawing salaries from the Northern Pacific and from other corporations, complaining about the equipment?

A. Yes, sir. (77-42.)

Q. Did any of these men tell you,—referring to this fifth cause of action,—that this particular brake staff was bent?

A. No, sir.

Q. Did any of these men call your attention to this particular brake staff?

A. No, sir." (Rec. pp. 76, 77 and 78.) Still later he testified:

"Q. Well, your answer as to this fifth cause of action as to getting up on the car and trying this brake,—would your answer as to these other cars on which you say the brake would not work be equally indefinite? *Did you or did you not get up on any of the cars on which you claim the brake staff was bent so that it would not work?*

A. *I would not say.*

Q. Did Mr. Weeks in your presence get up on any of them?

A. I cannot tell.

Q. Did you see him when he was with you work any of these brake staffs?

A. Yes, sir.

Q. You did? So as a matter of fact you were together, were you? (79-44.)

A. Yes, sir." (Rec. p. 80.)

We have underscored the language used, in the one question of which a partial excerpt is quoted as above stated, showing the connection with the other examination.

On re-direct examination, although this witness stated on cross examination that the striking trainmen had pointed out defects to him yet he had paid no attention to their suggestions, counsel complains

because he was not permitted to show that the witness was accused of being too friendly to the defendant. The court said that the evidence was clearly not in rebuttal of anything, and sustained the objection because he did not want the record encumbered with a lot of immaterial matter.

EIGHTH CAUSE OF ACTION.

There was no contention made at the trial that any of the cars were moved to Renton for repairs other than the one car in the 8th cause of action. There is no confusion on this point because the record is clear.

At the time of the examination of the first government witness this car, which is No. 67105, was admitted to have been moved from Auburn to Renton in a defective condition, (Rec. p. 53) and this admission with the statement that it was the only car that was so moved for repairs from Auburn to Renton was repeatedly made throughout the trial, as was the further statement that it was the defendant's contention that none of the other cars, when actually moved, contained the defects complained of.

> "MR. WINDERS.—I will admit that there was only one. That is the one in the eighth cause of action. The rest were all taken

to Narco, which is the dump of the Northwest Lumber Company. It is just beyond Renton.

Q. (Mr. List.) Refer now to extra 1263.

THE COURT.—That is, you admit that those going to Narco were not moved for the purpose of repairs?

MR. WINDERS.—Yes." (Rec. pp. 232, 233.)

"Q. I thought you said they went to some point beyond Renton. Didn't you say that these cars went to some point beyond Renton?

A. The other loaded cars.

Q. I am talking about the ones involved in this case?

A. Oh, yes, I understand.

Q. They went beyond Renton?

A. All except one.

THE COURT.—Did you say they had defects?

THE WITNESS.—I said this one car did.

Q. (Mr. List.) Have you got any notation of that?

A. This one car is marked Renton shops, —that and 23 others. The conductor had a car waybill or some information showing that those cars were going to the Renton shops.

MR. WINDERS.—He has not testified there was any (236-201) other defective cars.

THE WITNESS.—No, I thought we were here the last couple of days to show those were not defective." (Rec. pp. 239-240.)

The evidence shows that this car covered by the eighth count, with twenty-three other defective cars

were sent from Auburn to Renton for repairs, there being no facilities at either Auburn or South Tacoma at the time, and under the evidence Renton was the nearest available repair point.

It is true this car became defective while on the defendant's system at Tacoma some time prior to its being moved from Auburn to Renton. Why the government inspectors singled out this one car and not the other twenty-three is still one of the mysteries in connection with this case. Counsel for the government has stated at several places in his brief that it was denied by the witness produced by the defendant that this car was defective, as alleged, and that there was affirmative evidence in the record that if it was there were facilities at Auburn to make the repairs, and also devoted considerable space to the fact that the car had originally become defective at Tacoma some time prior to the movement from Auburn.

We cannot believe that counsel is any more serious in connection with the presentation of his views with reference to this cause of action than he is as to the others, for the record does not support his statements.

Superintendent McCullough, who had jurisdiction both over the tracks at Tacoma and Auburn, testified:

"Q. (Mr. Winders.) Why was that car going to Renton?

A. For general repairs, together with twenty-three or twenty-four others just like it.

Q. Did they go in this same train?

A. Yes, sir; altogether.

Q. All bad order cars?

A. All heavy flat cars going to Renton shops to be repaired.

Q. You say that car was with twenty-three or twenty-four others in this same train?

A. This report shows a total of twenty-four flat cars all together.

Q. Twenty-four flat cars were moved out as defective cars to Renton for the purpose of being repaired?

A. Yes, sir.

Q. As a matter of fact, where did that car become in bad order, Superintendent McCullough?

A. The previous movements of this car No. 67105, was that it arrived in Tacoma on July 29, with a load of logs, and was unloaded and found bad order, and held out of service, and it accumulated with other bad order heavy repair cars and moved over to Auburn on the night of the 30th,—August 30th, and then moved the next morning,—the whole bunch of them,—to Renton shops.

Q. The same train with these loaded logs going to Narco?

A. Yes, sir.

Q. In that train there was a total of twenty-three cars that were in bad order?

A. Twenty-four.

Q. They were not under load any of them?

A. No.

Q. At that time were you familiar with the situation existing in the Auburn yard so far as repairs were concerned?

A. Yes, sir; that is one of my chief businesses to keep in touch with it; although I had relieved myself as car inspector and car repairer."

* * * * * * * * *

"Q. *Were there any facilities in Auburn at that time in connection with the general movement of freight through there, including the facilities and available men to make repairs on these cars in Auburn?*

A. *Could not have been done; no, sir.*

Q. *Was there any other place that was more available to your knowledge at which these cars could have been repaired than Renton?*

A. *No, sir; not even South Tacoma.*

Q. During this same period in addition to this day you had sent other cars to the Renton Car Works for repair?

A. Yes, sir; crowded them in as tight as we could. They built additional tracks to take them." (Rec. pp. 224, 225, 226.)

R. M. Crosby, Mechanical Superintendent, testified:

"Q. On the 31st day of August, the evidence will show, on train leaving Auburn as was testified at 9:50, as a matter of fact it registered out at ten,—he had on that twenty

log cars in defective condition taking them to Renton to be repaired at the Renton car works. Did we (197-162) at that time on the 31st day of August have men available to put them in condition at Auburn?

A. I would say no. We did have men, but not sufficient.

Q. It was the honest judgment of yourself and the other officials of the Northern Pacific that it was an absolute necessity to take those cars to Renton for the purpose of being repaired?

A. Yes, sir." (Rec. pp. 198, 199.)

"Q. *The cars that were sent to Renton,—were they all sent from Auburn or also from Centralia,*—along about August 31st and the 2d of September?

A. *I have no record of any sent from Centralia, but naturally they would be sent because we sent log flats at that time for heavy repairs to Renton.*

Q. Where would you draw the line between the cars that you would send to Renton and those that you would repair there?

A. A car that was pretty badly shook or required sills in normal times would go to Renton. Of course at this time a car with less repairs would go there. We would naturally send cars to Renton at that time that we would not send under normal conditions.

* * * * * * * * *

"Q. Would you when you sent cars to Renton that had to have heavy repairs, but also needed these light repairs, which could have been repaired in a minute,—would you make those light repairs to the penalty defects, before sending the car to Renton?

A. We would if we had time, but we had other more important work to do at that time, and it would be questionable whether cars going to Renton would receive the same attention as if going out on the main line for our regular traffic.

Q. There was no line drawn, really, between the character of cars which you repaired in your own yard and those that you sent to Renton, so far as the Safety appliance defects are concerned?

A. Only in so far as what I have told you, —*If we had a car going there that was shook up,* why at that time *the chances are that they would not be as particular with the car as they would be with a car that was going out in a commercial train.*

Q. *You mean in making the repairs to the Safety appliances?*

A. *I am talking about safety appliances, or any other appliances."* (Rec. pp. 205, 206, 207.)

Road Master Allmain, referring to this car, said:

"Q. *Would you have tried to put on a brake wheel on a car* (260-225) *that was marked for the Renton car shops for repair?*

A. *We would not attempt to make repairs to such a thing on cars that went to the car shops.*

RE-CROSS EXAMINATION.

(By MR. LIST.)

Q. Mr. Crosby then was mistaken when he

testified that he always tried to make temporary repairs to cars before they left?

MR. WINDERS.—I haven't any record that he so testified.

THE COURT.—I sustain the objection. When you compare the testimony of one witness with a former witness you always produce a situation which leads to confusion." (Rec. p. 265.)

It is true that in answering general questions which clearly referred to defects on cars not going to Renton for repairs the witnesses did testify that such cars did not leave Auburn in the condition as testified by the government inspectors but such evidence was confined to cars other than the twenty-four bad order cars admittedly going to Renton for repairs.

We have sufficiently discussed the exception to Section 4 of the Safety Appliance Act and although many pages are devoted to a discussion of this eighth cause of action by the appellant, we believe that the evidence quoted above is a sufficient answer thereto. It is not true, as counsel states, that the company had facilities, or rather men, at Auburn and Tacoma, there is no evidence and no inference to support that statement and the further statement that the company denied that the car referred to in this cause of action was in the condition as alleged.

COUNT THIRTEEN.

By this count the government claimed that a log on a log flat car fouled the end handhold. It was the defendant's contention that by reason of the bunks on the log flats it was impossible for the end of the log to get within two inches of the end handhold, and several of the defendant's witnesses testified that they never knew of any such an occurrence in their many years of railroad experience and did not believe that it was possible to occur on a log flat. Complaint is made that the government was not permitted, in rebuttal, to show that it had made complaints of a similar condition before. It is not our opinion that such evidence was competent, there being no contention that the men who testified they had never heard of such an occurrence had been ever notified of such complaints, but the fact is that both Weeks and Winters (Rec. pp. 179, 188) were permitted to testify that they had called attention of certain of the employees to such condition. This evidence went in without any objection on our part.

Counsel then *wanted to show* that two of *his inspectors had gone into the Auburn yards on the day of the trial and found a log flat loaded with logs which, if the load swerved enough, might not afford sufficient clearance.* It is not our intent to

devote any time to show that this evidence was not competent, nor in considering the argument as to the dimensions of the log bunks on other cars concerning which there was no dispute in the evidence unless it be between his own inspectors.

A reading of page 186 of the record shows that the witness Winter testified that some of the bunks were as low as four inches and was also permitted to testify that he had measured some on the morning of the trial that were only four inches. (Rec. p. 189.) We will not quote the offer as to reports made by this witness to the Interstate Commerce Commission, counsel himself stating that the company would have no knowledge thereof. (Rec. p. 188.) A reading of the same pages of the record last referred to likewise will be sufficient to dispense with the necessity of any further argument with reference to this count.

We do direct the court's attention to the fact, however, that there is in the evidence, and without dispute, that if this log was in the position as complained of that then there were absolutely no facilities in Centralia, and within the yards of this defendant to unload it, (Rec. p. 276) and under this evidence it was at least a question for the jury, even if they found the log did foul the grab iron, to decide whether or not Centralia at that time was an available repair point or whether as a matter of

fact the nearest available repair point was the point where the logs were actually dumped as shown by the wheel reports.

It is only as to the eighth cause of action and to this thirteenth cause of action that any contention was made at the trial as to any movement under the exception to Section 4. The record shows that both prior to the case being submitted to the jury and in the presence of the jury it was so stated by counsel for the defendant in error, so that there was no shifting of positions and there was no camouflage, and there was no uncertainty either in the minds of counsel, court of jury as to the one car from Centralia and the one car from Renton being the only two cars, that under any finding by the jury would call for the application of or the determination of the question as to the nearest available repair point under the proviso referred to.

APPELLANT'S PROPOSED INSTRUCTION NO. 14.

Movement of Defective Cars Not Coupled with Chains, in Commercial Trains.

The government devotes from page 80 to page 91 of its brief to a discussion of one of the only two questions of law that could possibly be raised under the record. There is also included in this discussion

the appellant's proposed instruction No. 5, and its exceptions to instructions given, its Exception 43.

These assignments raise the question as to the right of respondent to transport to the then nearest, most available and practicable repair point equipment becoming defective on its system not fastened together with chains and moving in revenue trains. There are several statements in connection with this discussion as to there being no evidence that South Tacoma was not at that time an available repair point. We have already quoted Superintendent McCullough's testimony showing that it was not, and also from the evidence of Mr. Crosby. It is true that there is a statement in the record from Mr. Crosby, speaking generally as to where the company had repair points, in which he mentions both Auburn and South Tacoma, but there is no justification under the record for the statement that there is no dispute but what South Tacoma was an available repair point at the time. In any event this question was one properly submitted to the jury.

The 1910 Amendment to Section 4 of the original Safety Appliance Act, by express terms provides that where any car which shall have been properly equipped, becomes defective while being used by a carrier on its own lines, such car may be hauled from the place where it first became defective to "the nearest available point where such

car can be repaired, without liability for the penalties imposed, * * * if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point," and after providing that the carrier shall be liable for injuries to employees, further provides that "Nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or 'perishable' freight."

The attorney for the government argued before Judge Cushman and argues here that the language quoted in this proviso is broad enough to prohibit the hauling of any cars in revenue trains upon which there may be any penalty defect; this notwithstanding the language in the proviso is clear and is confined only to such hauling "of defective cars by means of chains instead of drawbars."

There is no justification for the taking up of space herein, or the time of this court, to state elementary principles of statutory construction or to cite cases in support of the rule, that courts will not read something into a statute which is already clear, definite and complete, and this contention presents a situation concerning which it is difficult to understand the basis upon which the responsible

heads of the safety department of our government have been led to authorize a re-presentation of this question. Our justification for making this observation is placed upon two grounds:

1. Full consideration has been given to such contention of the attorneys for the government, in appeals of similar cases, with the result that upon clear reasoning and by the application of elementary principles of statutory construction the same have been, upon consideration of the clear language of the act, swept aside.

2. Such construction, if the language used was in doubt, would not be given to this provision in view of the nonsensical result.

The evidence in this case shows that on a box car there could be about 200 penalty defects, (Rec. p. 267) the great majority of which have little, if anything to do with safety until the car actually reaches a terminal. In the great majority of cases these defects originate out on the line between terminals with cars under load, and most frequently are cases of bent or broken steps and handholds, some defects in the numerous contrivances in connection with the automatic feature of the coupling apparatus, on the brake wheel, brake rod, or on account of the drawbar being too low or too high, and until a car with such a defect reaches a terminal there is little, if any, likelihood of use being

made of any of such defective parts, and we do not believe that the responsible heads having the administration of the Safety Appliance work on behalf of the government would say that such defects should require the car so under load to be set out and left on a siding for an engine to take in, or left until a sufficient number of cars had been set out along the line as to justify the making up of a train of penalty defect cars. On the other hand, there are strong reasons for not permitting chained cars to be moved in connection with other cars moving commercially, and the inhibition in this proviso is only as to such cars.

Even prior to the passage of this 1910 Amendment many of the courts had held that a car becoming defective out on the road and under load could be brought in to the first terminal and some courts since the passage of the amendment have pointed out that it merely enacts in statutory form the rights the carrier had prior thereto. The government has not cited any case other than what is printed as an unpublished opinion of Justice Clark, when a district judge, admittedly reversed by the Circuit Court of Appeals for the Sixth Circuit, but as we have stated the courts have considered similar contentions.

In the case of *U. S. vs. Erie Railroad Co.,* 237 U. S. 402; 59 Law Ed. 1019, there was before the

Supreme Court a case involving eight violations. In two of the cases the drawbars were so inoperative that it was necessary to chain the cars together; the other six defects were of a less serious character.

The District Court and the Circuit Court of Appeals disposed of all eight counts adversely to the contention of the government upon the ground that all eight cars were merely taken from one yard of the defendant to another of its yards only a few miles distant, and this did not constitute a road movement, although all eight cars moved in a commercial train.

The judgments of both courts was reversed by the Supreme Court, it finding under the evidence that as to the six cars containing only minor defects they could and should have been repaired in the first yard, and that the movement thereafter was a road movement, and that as to the two cars containing defective drawbars, the proviso being discussed, made it unlawful to transport such cars in a revenue train.

In this opinion Justice VanDevanter quotes from the proviso prohibiting the handling of cars, in commercial service, when they are coupled with chains, as covering the entire scope of the proviso and clearly, by inference, interprets this exception as applying only to cars so attempted to be hauled.

In *Galveston, etc., Ry. Co. vs. U. S.,* 199 Fed.

891, the Circuit Court of Appeals for the Fifth Circuit, expresses the views of some of the authorities prior to the passage of the 1910 Amendment and holds that under the amendment there can be no doubt as to the right of the carrier to haul in revenue trains cars becoming defective on its system to the nearest, most available, repair point.

In *Erie Ry. Co. vs. U. S.,* 240 Fed. 28, the Circuit Court of Appeals for the Sixth Circuit, gave full consideration to this same contention holding that under the plain terms of the proviso there was no merit in the government's contention. This case was followed by the same court in an opinion written by *Justice Sanford* in the case of the *B. & O. S. W. R. Co. vs. U. S.,* 242 Fed. 420.

See also

Denver & R. G. Ry. Co. vs. U. S., 249 Fed. 822 (C. C. A. 8).

A consideration of the foregoing authorities renders a further discussion of each of the assignments raising this question unnecessary.

COUNT EIGHTEEN.

Assignments of Error 33, 34 and 35 have to do with the refusal of the court to direct a verdict for the government as to Count Eighteen, and

to its action in a direction of a verdict for the defendant.

This count covered a car which the two government inspectors testified was found on an interchange track used by the Northern Pacific to interchange cars with the Great Northern, they testifying that the drawbar was a fraction too low.

The court, upon motion of defendant, directed a verdict in its favor as to this count.

This interchange track was constructed pursuant to a franchise granted by the City of Seattle within Whatcom Avenue, sometimes called Railroad Avenue, a public street running along the water front of the City of Seattle. The portion of the street between the track and the one block of land separating the street from the Bay being paved, and one of the most heavily traveled streets in the City of Seattle, and abutting thereon, on the block intervening between the westerly side thereof and Elliott Bay are many industrial concerns. (Rec. p. 228-9, Weeks p. 170-1.)

All that was done with this car was to move it, with other cars on either side which had been delivered by the Great Northern on this track, to the end of the track and over a switch and into the yards of this respondent.

Inspector Weeks, one of the government inspectors, testifying in the government's case that

this, with other cars, was set upon this interchange by the Great Northern, and that the track was in a street on the paved part of which there was heavy traffic, testified:

"Q. You found a car on either side of this one?

A. Yes, sir; two cars.

Q. Was there any other way that the Northern Pacific could get this car into its yards than the way they did?

A. No, I don't think so.

Q. They did not haul it any further than they had to haul it to get it into their yard, did they, Weeks?

A. No, I would not think so." (Rec. p. 172.)

R. M. Crosby, Mechanical Superintendent, referring to the situation along this track testified:

"Q. Was the situation such in Seattle, Mr. Crosby, that you would have permitted any of the officials of the Northern Pacific or any new employees of the Northern Pacific to attempt to make any repairs to cars on this transfer track along Whatcom Avenue having the standpoint of safety of the men and the safety of the equipment and the property in mind?

A. No, I would not expect men to work there. I never send men to do what I would not care to do myself. I would not care to work there myself." (Rec. p. 201.)

Superintendent McCullough, who had charge of all terminal switching testified that it would be very

unsafe, in any event, to place men on this transfer track at this time unless the men doing the work were heavily guarded and that it was not until a considerable time later that he even permitted inspectors to go out along this street. (Rec. p. 229.)

The railway company, as a matter of law, could not have used this interchange track so located in a public street for repair purposes. Such purpose would be entirely inconsistent with its franchise grant and with the rights of the public to a joint use of the street. However, irrespective of this question, even if it had such a right, the situation at the time was such, on account of the shopmen's strike, as would have made it a real offense if it had endeavored to do so on account of a situation, in connection with which any undue excitement would not only endanger the company's property, but, undoubtedly, the lives of many innocent people. (Rec. pp. 201, 229.)

It was then a question of either taking this car into the yard over the switch from this interchange track and leaving it there, or taking it into the yard, switching it around until the car on either side had been detached therefrom, then setting it back on the interchange so that the Great Northern could take it and haul it back to its yard several miles distant and necessitating a haul along the entire water front of Seattle. The situation was acute

and certainly the incidental handling necessary by reason of the situation both as to the right to so use the interchange track and the surrounding conditions was not such a handling as was prohibited by any reasonable interpretation of the Safety Appliance Act.

Judge Cushman, in passing upon this, the most inadvised of all the counts, could not, without stultifying himself and the law which these inspectors were supposed to see was obeyed, do other, under the evidence, than to direct a verdict.

No court has ever held that such an incidental handling of a car was in violation of the terms of this act, and we can not better answer the contentions of the government in this regard than to quote the language of *Justice Sanford* in the opinion rendered by him for the Circuit Court of Appeals for the Sixth Circuit, in the case of *Baltimore, etc., Ry. Co. vs. U. S.,* 242 Fed. 420, in which opinion Justice Sanford said:

> "We add that, in our opinion, in case a defective car is received from a connecting carrier in a string or train of cars, the mere incidental handling of such car by the receiving carrier, refusing to accept it, in such manner as may be necessary to disconnect it from the other cars for redelivery to the connecting carrier and to proceed with the use of the other cars, would not be a use or hauling of such defective car by the receiving carrier which would subject it to the penalties of the

Act; such incidental handling of the car not being in contravention of the purposes of the Act, but a necessary step in furtherance thereof."

OTHER INSTRUCTIONS.

There are some few technical objections made to some other instructions that are discussed, all of which we have discussed in connection with the consideration of the pleadings and strike issue first discussed in this brief.

It is unnecessary to suggest that there is no theory upon which the defendant in error could be held liable if, after said train had been made ready to start it had been maliciously interfered with by third parties.

CONCLUSION.

We are fearful that the foregoing brief is more lengthy than reasonably necessary. We ask the indulgence of the court in connection with the extensive quotations we have made from the instructions and the evidence, and we have quoted only to such extent with the view of being of assistance to the court in considering the numerous, highly technical objections as made and the many argumentative suggestions based upon incomplete excerpts or references to the record.

Not only was there positive evidence that the defects complained of did not exist when the cars actually started on the road movement, from the several witnesses produced by the defendant, but there is documentary evidence in the record which, as stated by counsel for appellant in his brief, should show from the trainmen any defects, if any existed, while the train was out on the road.

We do not view the evidence of the two government inspectors in much different light than did the jury.

Superintendent McCullough, at the request of counsel for the government, drew upon the blackboard an outline of the trackage over which the three trains referred to in the evidence departed from the Auburn yard. The witness Winter places his inspection of certain of these cars at a certain hour (Rec. pp. 76, 84, 91), and the witness Weeks says that he had left the cars an hour prior thereto (Rec. pp. 146-7), although the witness Winter says that Weeks was with him when the inspection was made (Rec. p. 76). The three trains at Auburn moved out within a period of a very few minutes of each other (Rec. p. 84) and over leads one of which was over two miles from the other two (Rec. p. 282). I do not say that these two government witnesses did not believe that these cars were defective, but the jury had a right to believe that they were not

defective when actually moved, and this court is not, in our opinion, going to say that the jury should not have believed the defendant's testimony.

There is nothing in this case, in our opinion, other than disputed questions of fact. The law was fairly given to the jury, and the government had a fair trial. It apparently did not consider any serious error was made in the instructions given and refused, as no application was made for a new trial and no attempt made to argue before the learned District Judge the many technical errors now assigned.

Respectfully submitted,

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